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July 17, 2013

MTC-ABAG Plan Bay Area Public Comment
101 8th Street Oakland,
California 94607

Re: Public Comment on the Final Plan Bay Area and the Final Plan Bay Area Final Environmental Impact Report

I write on behalf of Sustainable TamAlmonte and myself to comment on the Final Plan Bay Area and the Final Environmental Impact Report ("Final EIR") for Plan Bay Area ("Project"):

Sustainable TamAlmonte is a group of Tam Valley and Almonte residents who want to preserve and enhance the environmental qualities of their unique bayside communities. The members of Sustainable TamAlmonte support truly sustainable land use and development in the Tamalpais Community Services District and the Almonte Sanitary District of Unincorporated Marin, and have grave concerns about the environmental, health and safety impacts that result from poor land use planning, including environmentally detrimental projects. Therefore, Sustainable TamAlmonte has a strong interest in enforcing environmental laws to protect the Tam Valley and Almonte communities' valuable environmental resources, and the health and safety of current and future residents.

INTRODUCTION

On May 1, 2013, we submitted comments on the Draft Plan Bay Area Draft EIR for the Project. The Final EIR includes responses to our comments. However, ABAG's & MTC's responses fail to cure the Draft EIR's deficiencies identified in our comments. Therefore, our May 1, 2013 comments are applicable to the Final EIR and are incorporated by reference herein.

Like the Draft EIR, the Final EIR fails to adequately disclose, analyze and mitigate the Project's potentially significant impacts. The Final EIR improperly defers adequate analysis, disclosure, and mitigation of many impacts to a future date.

An analysis of impacts that are reasonably foreseeable should be provided in a planning stage EIR if the information for the analysis is reasonably available.¹ Further, it is well established that EIRs can and should make reasonable forecasts.² Lead agencies must use their best efforts to find out and disclose all that they reasonably can.³

Therefore, the Final EIR fails to comply with the requirements of the California Environmental Quality Act ("CEQA") and the Project cannot be approved until an adequate EIR is prepared and circulated for public review.

In addition, we would like to point out that ABAG and MTC failed to provide documents in a timely manner as required by the California Constitution. ABAG & MTC have, therefore, violated State law and greatly limited the public's ability to adequately review and comment on the Final EIR.

I. ABAG & MTC VIOLATED THE CALIFORNIA CONSTITUTION WHEN IT FAILED TO PROVIDE DOCUMENTS APPROPRIATELY.

Article I, section 3(b) of the California Constitution, provides a constitutional right of access to information concerning the conduct of government. Article I, section 3(b) provides that any statutory right to information shall be broadly construed to provide the greatest access to government information and further requires that any statute that limits the right of access to information shall be narrowly construed.

Accordingly, we were notified that the Final EIR for Plan Bay Area was available for review via email on July 11, 2013. However, the Final EIR had been completed a week prior without any notification, severely limiting our ability to properly respond and submit comments on the Final EIR.

¹ Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40

² See San Francisco Ecology Center v. City and County of San Francisco (1975) 48 Ca.Ap.3d 584, 595.

³ 14 Cal. Code Regs. § 15144.

Moreover, other comment letters, which raised significant environmental issues, were never responded to. Failure of a lead agency to respond to comments raising significant environmental issues may render the EIR inadequate. ABAG and MTC not only violated State law, but thwarted public participation in the review of the Final EIR.

II. ABAG & MTC ARE MISLEADING THE PUBLIC WHEN THEY STATE THAT PROJECT-SPECIFIC ENVIRONMENTAL REVIEW WILL OCCUR WHEN SPECIFIC DEVELOPMENT PROJECTS ARE PROPOSED.

ABAG & MTC attempt to squelch public concern over the Project's inadequately disclosed and inadequately analyzed impacts by stating that "Subsequent second-tier land use plans (such as city and county general plans and specific plans) as well as project-specific CEQA analysis will be undertaken by implementing agencies."⁴ ABAG's & MTC's attempt is misleading for two reasons.

First, although ABAG & MTC state that project-specific CEQA analysis will be undertaken, they do not require project-level review. This is particularly concerning because most of the public is probably not familiar with the many CEQA exemptions that could apply to future site-specific projects.⁵ Therefore, ABAG's and MTC's statement is misleading.

Second, in light of recent case law, ABAG's and MTC's statements, such as "project-specific CEQA analysis will be undertaken by implementing agencies,"⁶ are rendered completely meaningless. In *Concerned Citizens of Dublin v. City of Dublin*, the court held that an agency's consideration of whether an exemption applies to a project "is itself an environmental review."⁷ In other words, when project-specific projects are proposed in accordance with the Project, the lead agency's consideration of the applicability of CEQA exemptions would constitute environmental review.

⁴ ABAG & MTC's Master Response AB3: "Specificity of a Program EIR", Pg. 3.1-7

⁵ See, for example, Pub. Resources Code § 21159.23 Low Income Housing Exemption, Pub. Resources Code § 21159.24 Infill Housing Exemption, Cal. Code Regs. § 15194 Affordable Housing Exemption and Cal. Code Regs. § 15195 Residential Infill Exemption.

⁶ ABAG's & MTC's Master Response A.3: "Specificity of a Program EIR", Pg. 3.1-7

⁷ *Concerned Citizens of Dublin v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1316-1317.

Therefore, the public cannot be comforted by ABAG's & MTC's statements that project-specific environmental review will occur when projects are proposed because that "additional environmental review required" may be nothing more than a CEQA exemption determination.

III. THE PLAN BAY AREA'S FINAL EIR'S ASSUMPTIONS REGARDING POPULATION AND JOB PROJECTIONS FOR MARIN COUNTY ARE MISGUIDED BECAUSE EVIDENCE SHOWS THAT THE FINAL PLAN BAY AREA PROJECTIONS ARE INACCURATE AND UNREALISTIC.

The ABAG/MTC Response C33-2 tries to justify Plan Bay Area's regional growth forecast, including population projections, job projections and household projections. Never the less, these projections are inaccurate because all projections regarding Marin County are inaccurate and unrealistic.

Pg. ES 8 of the Draft Plan Bay Area's DEIR lists "Key EIR Assumptions" and includes the following key assumption: "The total amount of growth projected for the Bay Area through 2040 is based on ABAG's Plan Bay Area Forecast of Jobs, Population and Housing (the forecasts used to develop the Jobs-Housing Connection) that is available for review on the project website (<http://www.onebayarea.org>); this amount of growth is assumed in the proposed Plan, which identifies a land use pattern to accommodate the projected growth."

As demonstrated in our May 1, 2013 letter, for Marin County, the above key assumption is misguided because evidence shows that the Draft Plan Bay Area's forecast of Jobs, Population, and Housing in Marin County is unrealistic.

Marin County Employment Growth:

The Draft Plan Bay Area's Jobs-Housing Connection Scenario forecasts Marin County's employment growth at 17% by 2040, or about one-half percent per year. Although this appears to be consistent with historical growth of 16% from 1980-2010, in fact, and as pointed out by the Transportation Authority of Marin in its April 26, 2012 letter to ABAG, job growth in Marin was substantial only from 1980 to 1990. In 2011, employment levels were about the same as they were in 1990, with a consistent decrease since 2000.

Marin County lacks the type of developable land associated with business growth of the 1980s, and has limited availability of water resources. It is unlikely that Marin can match the robust job growth of the 1980s. In addition, the long-term employment forecast is unrealistically high for Marin's growing population of seniors who are retired or not fully employed. An adjustment to the labor participation rate should be made.

The Final Plan Bay Area's Final EIR assumes that the Final Plan Bay Area's Population and Job Growth projections are correct. However, the information above and in our May 1, 2013 letter demonstrates that the plan's population and job growth projections for Marin County are unrealistic. Therefore, assessments made by the Final Plan Bay Area's Final EIR that were based on the Final Plan Bay Area's Marin County Population and Job Growth projections must be reviewed and revised.

IV. THE FINAL PLAN BAY AREA'S FINAL EIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE IMPACT 2.1-3 "SUBSTANTIAL INCREASE IN PER CAPITA VEHICLE MILES TRAVELED (VMT) ON FACILITIES EXPERIENCING LEVEL OF SERVICE (LOS) F" (Pg. ES-13 Final Plan Bay Area FEIR).

Our May 1, 2013 letter demonstrated that the Draft Plan Bay Area DEIR was insufficient because it failed to adequately analyze and mitigate Impact 2.1-3 on smaller busy highways with LOS "F". Since the Final Plan Bay Area does not offer any additional mitigations for Impact 2.1-3 to those provided in the Draft Plan Bay Area, the Final Plan Bay Area also fails to adequately analyze and mitigate Impact 2.1-3 on smaller busy highways with LOS "F".

The ABAG/MTC Response C33-5 states; "Refer to response C33-4 regarding the regional scope of the Plan Bay Area Draft EIR – for the purposes of this regional programmatic EIR the localized operational issue cited by the commenter is not addressed."

C33-5 is an inadequate response. An analysis of impacts that are reasonably foreseeable should be provided in a planning stage EIR if the information for

the analysis is reasonably available.⁸ Lead agencies must use their best efforts to find out and disclose all that they reasonably can.⁹

Here, the information to conduct analyses of the Project's localized operational traffic impacts is reasonably available. For example, information to conduct an analysis for traffic impacts associated with Hwy 1 in Unincorporated Mill Valley in unincorporated Mill Valley (which has an LOS "F" and is located in the Transportation Priority Project (TPP) Corridor and the Hwy 101 Corridor Priority Development Area of Plan Bay Area), is available (see Marin County Housing Element Final Supplemental Environmental Impact Report, available at http://www.co.marin.ca.us/depts/CD/main/pdf/eir/Marin_County_Housing_Element_Final_SEIR_Amendment_June2013.pdf).

The ABAG/MTC Response C33-6 states; "Mitigation measure 2.1(b) would mitigate Impact 2.1-3 by reducing the overall need to drive across the region, including on small highways and arterials."

Mitigation Measure 2.1(b) states; "MTC and the BAAQMD shall proceed with implementation of the region's commute benefit ordinance authorized by Senate Bill 1339, which affects all major employers (with more than 50 employees) and discourages auto-based commute travel."

As stated in our May 1, 2013 letter, 2.1(b), if it has any affect, will only help to mitigate a substantial increase in per capita VMT on roadways with LOS "F" that act as commutes to major employers (with more than 50 employees). Many smaller busy highways with an LOS "F", such as Hwy 1 in Unincorporated Mill Valley, primarily act as a commute to small employers with less than 50 employees. Senate Bill 1339 does not apply to small employers with less than 50 employees.

Moreover, under "Significance after Mitigation", the Plan Bay Area's EIR admits that Mitigation Measure 2.1(b) may be totally ineffective: "While the mitigation measures described above commit MTC and ABAG to advance bridge toll and commuter benefit policies to reduce levels of severe traffic

⁸ Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40 Cal.4th 412; Stanislaus Natural Heritage Project v. County of Stanislaus (1996) 48 Cal.App.4th 182.

⁹ 14 Cal. Code Regs. § 15144.

congestion, it is not known at this time if these strategies would reduce the impact below the significance threshold of a five percent increase to a less than significant level. Furthermore, MTC and ABAG cannot guarantee that local jurisdictions or employers would implement such policies in the most effective manner possible, given political or financial limitations. For purposes of a conservative analysis, therefore, this impact is determined to remain significant and unavoidable (SU).”

Therefore, just like the Draft Plan Bay Area DEIR, the Final Plan Bay Area Final EIR is insufficient because it fails to adequately analyze and mitigate Impact 2.1-3 on smaller busy highways with LOS “F”.

V. THE FINAL PLAN BAY AREA FEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE POENTentially SIGNIFICANT IMPACTS ASSOCIATED WITH AIR QUALITY.

The Final Bay Area Plan FEIR sites **Impact 2.2.5 (a)** “Localized net increase in sensitive receptors located in Transit Priority Project (TPP) corridors where TACs or fine particulate matter (PM2.5) concentrations results in a cancer risk greater than 100/million or a concentration of PM2.5 greater than 0.8 ug/m3” and **Impact 2.2.5(b)** “Localized net increase in sensitive receptors located in Transit Priority Project (TPP) corridors within set distances to mobile or stationary sources of Toxic Air Contaminants (TACs) or Particulate Matter (PM2.5) emissions.”

Our May 1, 2013 letter demonstrated that the Draft Plan Bay Area DEIR was insufficient because: A) The DEIR failed to adequately analyze and mitigate Impact 2.2.5(a) and Impact 2.2-5(b) on small sites and sites surrounded by multiple TAC and PM2.5 emission sources; B) The DEIR failed to adequately disclose and analyze the severity of significant cumulative health risks caused by Impact 2.2-5(a) and Impact 2.2-5(b); and C) The DEIR failed to adequately mitigate Impact 2.2-5(a) and Impact 2.2-5(b) because mitigation measures fail to protect sensitive receptors outdoors.

Since the Final Plan Bay Area does not offer any additional mitigations for Impact 2.2-5(a) and 2.2-5(b) to those provided in the Draft Plan Bay Area, the Final Plan Bay Area also fails to adequately analyze and mitigate Impact 2.2-5(a) and 2.2-5(b) in the same way that the DEIR failed.

The ABAG/MTC Response C33-7 states; “For these areas above the numerical thresholds for TAC and PM2.5 and the other sources listed above, additional project level analysis should be done when specific projects are designed and proposed to determine the significance of impacts and the level of mitigation measures needed to reduce impacts below the significance level, if available.”

The above referenced response is disingenuous and misleading because ABAG and MTC know that, due to CEQA exemptions and streamlining discussed in our above Comment II, additional project level analysis may never be performed.

VI. THE FINAL PLAN BAY AREA FEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS ASSOCIATED WITH SEISMIC ACTIVITY.

Our May 1, 2013 letter demonstrated that the Draft Plan Bay Area DEIR was insufficient because: A) The DEIR failed to adequately disclose, analyze, and mitigate potentially significant impacts associated with ground shaking (Impact 2.7-2); B) The DEIR failed to adequately disclose, analyze and mitigate potentially significant impacts associated with seismic-related ground failure, including liquefaction (Impact 2.7-3); and C) the DEIR failed to adequately disclose, analyze, and mitigate potentially significant impacts associated with deterioration of grounds surrounding building due to ground shaking and seismic-related ground failure, including liquefaction.

As discussed in our May 1, 2013 letter, the findings, related to the potentially significant impacts associated with seismic ground shaking and seismic-related ground failure (including liquefaction), found in the Marin Countywide Plan’s EIR and the 2012 Marin County Housing Element’s SEIR conflict with the Draft Plan Bay Area’s Draft EIR and prove that the impacts after mitigation would remain significant unavoidable project and cumulative impacts.

Since the Final Plan Bay Area Final EIR does not offer any additional disclosure, analysis or mitigations for Impact 2.7-2, Impact 2.7-3, and settlement issues (e.g. cracked pathways) to those provided in the Draft Plan Bay Area’s Draft EIR, the Final Plan Bay Area’s Final EIR also fails to adequately disclose, analyze and mitigate Impact 2.7-2, Impact 2.7-3, and

settlement issues in the same ways that the DEIR failed.

VII. THE DRAFT PLAN BAY AREA FEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS ASSOCIATED WITH SEA LEVEL RISE.

Our May 1, 2013 letter demonstrated that the Draft Plan Bay Area DEIR was insufficient because: A) The DEIR failed to adequately disclose, analyze, and mitigate potentially significant impacts associated with sea level rise because its analysis does not analyze potential century (E.g. 2100) Sea Level Rise, which corresponds to the life expectancy of development encouraged by Plan Bay Area; B) The DEIR failed to adequately disclose, analyze and mitigate the potential significant impact of a net increase in the number of people residing within areas regularly inundated by sea level rise (Impact 2.5-6); and C) The DEIR failed to adequately disclose, analyze, and mitigate potentially significant impacts associated with an increase in land use development within areas regularly inundated by sea level rise (Impact 2.5-7).

Since the Final Plan Bay Area FEIR does not offer any significant additional disclosure, analysis or mitigations for potentially significant impacts associated with Sea Level Rise, Impact 2.5-6, and Impact 2.5-7, to those provided in the Draft Plan Bay Area's DEIR, the Final Plan Bay Area's FEIR also fails to adequately disclose, analyze and mitigate Sea Level Rise, Impact 2.5-6, and Impact 2.5-7 in the same ways that the DEIR failed.

ABAG's And MTC's Disclosure, Analysis, And Mitigations For Potential Sea Level Rise Impacts Are Insufficient:

ABAG's and MTC's Master Response E: Sea Level Rise states; "The Draft EIR proposes a number of mitigation measures and adaptation strategies that may reduce project-specific sea level rise impacts to a less than significant level." The Master Response further states; "The EIR provides the public and the decision-makers with a detailed analysis of potential sea level rise impacts and sets forth mitigation measures that may reduce this impact to a less than significant level for future projects."

On the contrary, the analysis of potential sea level rise impacts and related mitigation measures and adaptation strategies are substantially insufficient.

The Final EIR does not offer adequate mitigation measures to mitigate Impact 2.5-6: the potentially significant impacts associated with a net increase in the number of people residing within areas regularly inundated by sea level rise and Impact 2.5-7: the potentially significant impacts associated with an increase in land use development within areas regularly inundated by sea level rise.

To require future analysis and future planning to select or create future adaptation strategies are not mitigations that can be evaluated now as to whether or not they can mitigate the impacts. Rather, these requirements defer adequate analysis, disclosure, and mitigation of the impacts to a future date.

The Final Plan Bay Area's FEIR approach violates CEQA. The FEIR must include mitigations that can be evaluated now as to whether or not they have merit; ABAG and MTC cannot wait until after Project approval. This information is necessary for decision makers to determine if sites identified for housing development are suitable for residential use, besides other determinations. The FEIR's approach undermines the entire point of the CEQA process -- to offer the public and the decision makers the opportunity to weigh-in on a project's potentially significant impacts and an agency's proposed measures to mitigate those impacts. It is well- established that CEQA is not meant to be a *post hoc* rationalization of decisions that have already been made. "If post-approval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken."¹⁰

The FEIR Fails to adequately disclose, analyze, and mitigate potentially significant impacts associated with sea level rise because its analysis does not analyze potential century (E.g. 2100) Sea Level Rise, which corresponds to the life expectancy of development encouraged by Plan Bay Area:

On Page 2.5-46, the Final EIR states that potential midcentury (e.g., 2050) sea level rise conditions were selected for the EIR's analysis of sea level rise. This time period is totally inadequate for a plan that guides development through Year 2040. Any building developed in 2040 would

¹⁰ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394.

potentially last until the end of the century (2100), if not longer. Consequently, the Draft DEIR should have based its analysis of sea level rise on century (e.g., 2100) sea level rise conditions, at a minimum.

Ample Information Is Available To Evaluate Sea Level Rise:

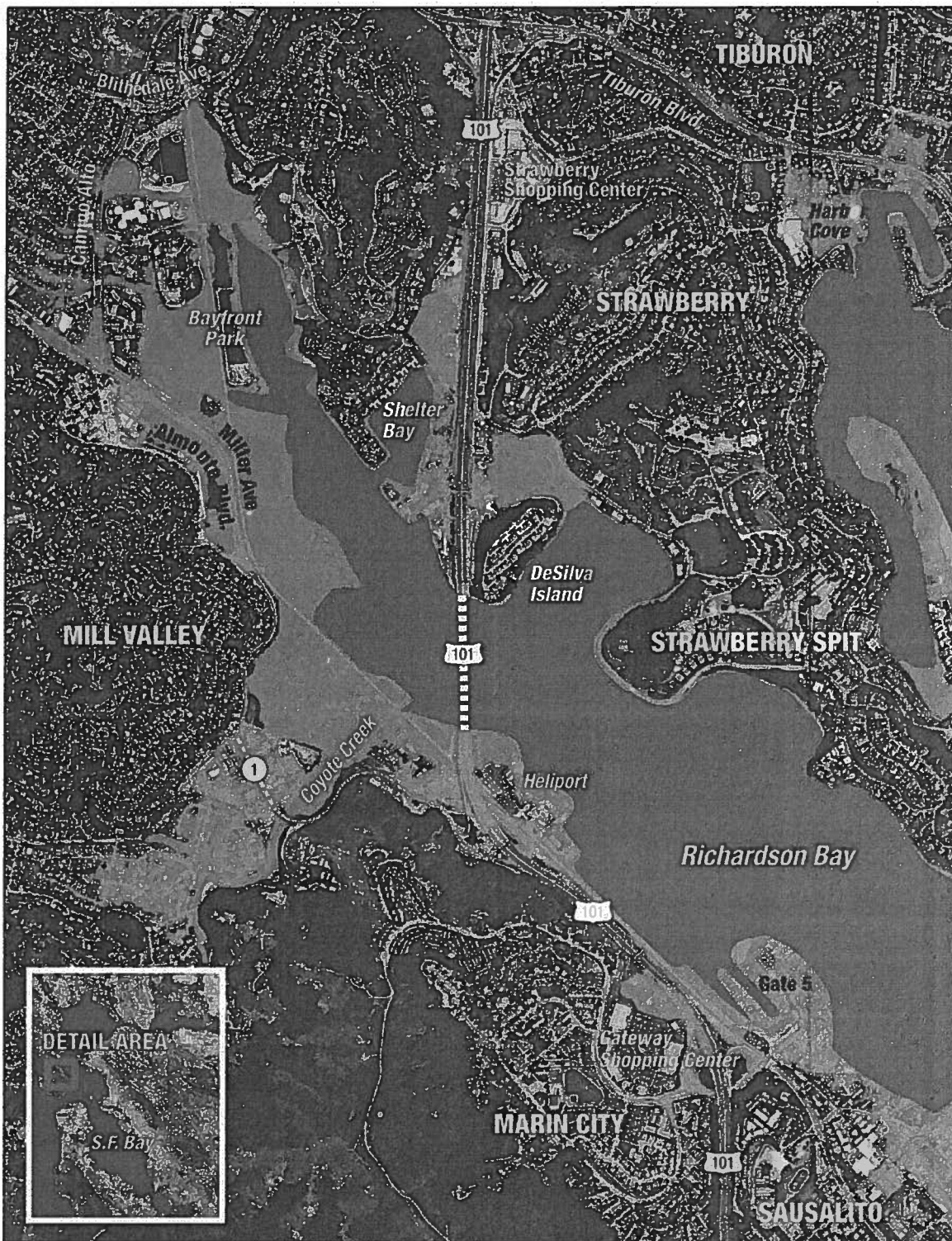
ABAG/MTC's Master Response E: Sea Level Rise states; "Some public comments requested that the EIR evaluate the significance of sea level rise impacts for 2100 rather than 2050. The extent of the future potential sea level rise inundation area is uncertain. The sea level rise inundation extents used in the EIR do not account for future changes in bay morphology, land use, or shore protection upgrades that may occur over time, in part because this information is not available."

Contrary to the above excerpt from ABAG/MTC's Master Response E, there is ample information available to evaluate the significance of sea level rise impacts for 2100.

The Bay Conservation and Development Commission (BCDC) (bcdc.ca.gov), the Point Blue Conservation Science (pointblue.org), the Pacific Institute (pacinst.org), the San Francisco Bay Subtidal Habitat Goals Project (sfbaysubtidal.org), the San Francisco Estuary Partnership (SFEP) (sfestuary.org), the California State Coastal Conservancy (SCC) (scc.ca.gov), the California Ocean Protection Council (OPC) (opc.ca.gov), the NOAA Habitat Conservation (habitat.noaa.gov), the NOAA Restoration Center (restoration.noaa.gov), the USGS Western Ecological Research Center (werc.usgs.gov), the ISGS California Water Science Center (ca.water.usgs.gov), and the US Geological Survey (USGS) (usgs.gov) have completed expert reports and continue ongoing extensive research on sea level rise, including the evaluation of sea level rise impacts for 2100.

For example, below is a BCDC map that shows one meter sea level rise at Richardson Bay. It depicts sea level rise in areas that are included in Plan Bay Area's Transit Priority Project Corridor and Plan Bay Area's Hwy 101 Corridor Priority Development Area (PDA). You will notice that large portions of the Transit Priority Project Corridor and the PDA are expected to be under water.

One meter sea level rise at Richardson Bay



Source: BCDC

Sea Level Rise Analysis Is Required By CEQA:

In their Master Response E: Sea Level Rise, ABAG and MTC try to assert that sea level rise analysis is not required by CEQA by stating; “A recently published CEQA decision opines that sea level rise impacts “do not relate to environmental impacts under CEQA” and are not required to “be analyzed in an EIR.” (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 475 (Ballona).) Sea level rise constitutes an impact of the environment on the proposed Plan (as opposed to impacts of a project or plan on the environment). In *Ballona* the court explicitly concluded that an EIR was not required to consider sea level rise impacts. (*Ibid.*) The court reached this conclusion because “the purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project.” (*Id.* at p. 473.)”

Contrary to ABAG and MTC’s above assertion, sea level rise analysis is most definitely required by CEQA.

In *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, the City of Los Angeles rejected the Pacific Institute sea level rise findings in favor of the report of a local civil engineer. The reporting engineer noted that the project site in *Ballona Wetlands Land Trust* was “two miles from the ocean..., failed to account for elevated land between the project site and the coastline that would act as a barrier, and failed to account for the topography of the project site and building elevations.” (*Id.* at 472.) Here, the Project involves many low-lying areas that are particularly susceptible to tidal flow, unlike the proposed upgradient construction in *Ballona Wetlands Land Trust*.

Citing two public health cases to support its conclusions, the *Ballona Wetlands Land Trust* court stated, “the purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project.” (*Id.* at 473.) If this were indeed the rule as applied in the cited cases, ABAG/MTC should not have been concerned at all with impacts associated with locating sensitive receptors near sources of toxic air contaminants or with impacts associated with locating development in active seismic zones.

Further, an integral part of EIR analysis is land use compatibility, which by definition, is a two-way street. Suggesting that the *Ballona Wetlands Land Trust* case stands for the notion that the public has no right to know if a

project is being placed directly on a known seismic fault, in the path of a tsunami, atop an abandoned toxic waste dump, or subject to sea level rise is unfathomable and flies in the face of the most fundamental aspects of CEQA.

IX. CONCLUSION

While the Final EIR provides some additional information in response to our May 8, 2013 comments, ABAG's and MTC's responses fail to cure the Draft EIR's deficiencies identified in our comments. Like the Draft EIR, the Final EIR fails to disclose, analyze and mitigate the Project's potentially significant impacts. The Final EIR improperly defers adequate analysis, disclosure, and mitigation of many impacts to a future date. Therefore, the Final EIR fails to comply with CEQA and ABAG and MTC cannot approve the Project until an adequate EIR is prepared and circulated for public review.

Very truly yours,

/s/

Sharon Rushton

Chairperson

Sustainable TamAlmonte